

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7241

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7241

BFTTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants-Appellees,

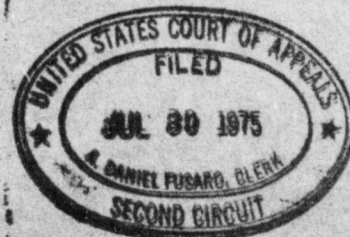
JAMES C. GABRIEL,

Petitioner-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLEES ON THE APPEAL OF JAMES C. GABRIEL
FROM AN ORDER OF MARCH 21, 1975 DENYING HIS MOTION WITH
RESPECT TO THE FINAL JUDGMENT OF MAY 2, 1973

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IN THE UNITED STATES COURT OF APPEALS
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BETTY LEVIN, ALLEGHANY CORPORATION
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-against-

MISSISSIPPI RIVER CORPORATION,
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ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants-Appellees,

JAMES C. GABRIEL,

Petitioner-Appellant.

BRIEF OF APPELLEES ON THE APPEAL OF
JAMES C. GABRIEL FROM AN ORDER
DENYING HIS MOTION WITH RESPECT TO
THE FINAL JUDGMENT OF MAY 2, 1973

This is yet another appeal--the fourth--from a final judgment entered in this case over two years ago. Appellant moved the court below, on March 4, 1975, to set aside the final judgment of May 2, 1973 approving the settlement of this action. This motion was denied by order dated March 21, 1975, which is the subject of the instant appeal.

Since this March 21, 1975 denial, the appellant has again moved the court below, by motion of May 19, 1975, to

reopen this case; said motion was denied on June 3, 1975 and characterized by Judge Weinfeld as "vexatious".* Dkt. p. 11.

This brief is submitted by all plaintiffs-appellees and defendants-appellees in opposition to the instant appeal. The manifold, incoherent, and oft-repeated arguments posed by Mr. Gabriel are wholly without merit; each of these arguments has been previously raised and rejected in prior proceedings in this case before the district court, in this Court, on various petitions for writs of certiorari, on various petitions for rehearing of denials of writs of certiorari, and before the Interstate Commerce Commission ("ICC"); no new matter was presented to the court below or has been presented in this Court. There is simply no basis on which to overturn the decision of the court below.

COUNTERSTATEMENT OF THE ISSUE

Was the denial of the Gabriel motion of March 4, 1975 with respect to the final judgment improper?

*

This case has been before this Court on several previous occasions. We refer this Court to the record filed and briefs submitted on appeals bearing the docket numbers 73-1864; 73-1865; 74-2104; 74-2172; 74-2231; and T-3063, for further reference throughout this brief. References to the various motions and appeals are cited to the docket sheet as "Dkt. p. ". In addition, citations to the appendix ("A. "), are to the appendix prepared by appellees on the appeal in 74-2104 and filed with this Court.

COUNTERSTATEMENT OF THE CASE

A. The Background of the Litigation.

The settlement of this action embodying a recapitalization of the Missouri Pacific Railroad Company ("MoPac") and a tender offer to former Class B stockholders by Mississippi River Corporation ("Mississippi"), formerly MoPac's majority Class A stockholder, was designed to settle this litigation and a broader feud between the two classes of stockholders existing since the 1930's. The long and complex history of the stockholder dispute and of this litigation is set forth in the opinion of March 19, 1973 of Judge Edward Weinfeld approving the settlement, which is reported as Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973), aff'd on opinion below sub nom., Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir. 1973), cert. denied sub nom., Wesson v. Levin, 414 U.S. 1112 (1973), reh. denied, 415 U.S. 939 (1974).

The action was brought by Class B stockholders of MoPac against the railroad, its majority stockholder Mississippi and certain directors, as a class and derivative action basically seeking increased dividends to Class B stockholders under the common law and relief for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Jurisdiction was founded on diversity of citizenship and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. A. 179-201.

The plaintiff class was found to be a Rule 23(b) (1) and (b) (2) class by order of the District Court (Van Pelt Bryan, D.J.) on October 9, 1968. A. 174-178.

B. The Final Judgment and Its Review.

After notice and hearing the settlement was approved by the District Court under Rule 23(e) and 23.1 of the Federal Rules of Civil Procedure in an opinion of Judge Edward Weinfeld of March 19, 1973. Levin v. Mississippi River Corp., supra. Final judgment dismissing the action was entered thereon on May 2, 1973. A. 389-91.

Mr. William R. Wesson, an objecting Class B stockholder, unsuccessfully appealed the judgment approving settlement to this Court, A. 401, unsuccessfully sought certiorari from the Supreme Court, A. 402 and unsuccessfully sought reconsideration of the denial of certiorari. A. 403-19. At the same time Mr. Wesson also appealed, unsuccessfully, the denial of his motion to amend Judge Weinfeld's decision approving the settlement. A. 392-400. In this appeal, Wesson contested the determination of the class, A. 392-400; A. 403-18, and on his appeal from the final judgment Wesson argued that plaintiff Alleghany was not a proper class representative, that the form of settlement embodying a recapitalization of MoPac was improper, that the terms of the settlement were unfair to Class B stockholders and that the Court should adopt Wesson's alternative settlement plan.

C. The Consummation of the Settlement.

The settlement was conditioned on stockholder approval of the recapitalization of MoPac, A. 219, and on ICC approval of the issuance of securities for such recapitalization. A. 219-20. The MoPac recapitalization was overwhelmingly approved by both classes of MoPac's stockholders and the issuance of securities therefor was approved by the ICC after a week-long hearing at which objecting stockholders were heard at length. A. 420-502; Missouri Pacific Railroad Co., Securities F.D. 27346, 347 ICC 377 (Div. 3 1973). Several petitions for reconsideration by objecting stockholders, including that of Mr. James C. Gabriel, the instant appellant, were denied by the ICC, A. 513-14, and the recapitalization and the related tender offer by Mississippi were consummated on January 21, 1974.

D. The Post-Final Judgment History of Litigation.

On November 20, 1973 one Michael Moumousis, a Class B stockholder, filed a motion in the District Court to set aside the judgment approving the settlement, alleging newly discovered evidence -- the fact that Alleghany's MoPac stock was in a voting trust supposedly indicating improper representation of the class by Alleghany, a ground already urged upon the ICC and upon the Supreme Court. A. 1-2. Moumousis' motion was denied by Judge Weinfeld

within hours of oral argument by an order dated December 5, 1973, holding that the motion was in effect one for reargument, the Alleghany voting trust having been disclosed on the settlement hearing and even specifically referred to in the District Court's opinion approving the settlement (59 F.R.D. at 358). A. 64-65.

Moumousis appealed from the order denying his motion. A. 66-67.

On February 22, 1974 and again on March 26, 1974, one Napoleon C. Gabriel, a brother of the present appellant James C. Gabriel, moved the District Court to modify the judgment approving the settlement, alleging, among other things, that the class determination was improper under the Supreme Court's decision in Zahn v. International Paper Co., 414 U.S. 291 (1973). The alleged improper representation of the class by Alleghany and the alleged impropriety of a recapitalization form of settlement were also raised by this Mr. Gabriel. A. 68-85. This motion was denied by Judge Weinfeld's order dated and entered April 8, 1974. A. 86.

Napoleon Gabriel appealed from the order denying his motion. A. 87-89.

Objectants before the ICC, after unsuccessful petitions for rehearing, challenged the decision of the ICC in the U.S. District Court for the District of New Jersey and in the U.S. District Court, Eastern District of Missouri.

In Missouri the ICC decision was upheld by a three-judge court sub nom. Gillespie v. U.S. (E.D. Mo. Civ. Action No. 74--239 C(2) November 14, 1974.) The New Jersey action is still pending.

After the termination of Mr. Wesson's unsuccessful appeal from the final judgment of March 2, 1973 and after stockholder and ICC approval and consummation of the recapitalization and tender offer, plaintiffs' attorneys and the plaintiff Alleghany Corporation submitted an application for the allowance of attorneys' fees and costs. A. 90-145. After a full hearing on March 26, 1974, at which the instant appellant appeared, Judge Weinfeld wrote an opinion approving attorneys' fees, 377 F. Supp. 926 (S.D.N.Y. 1974), and an appropriate order was entered on July 3, 1974. A. 172-173. That order was appealed from, and heard together with the appeals of Napoleon Gabriel and Moumousis described above, and the Second Circuit affirmed Judge Weinfeld's decisions on December 18, 1974. Dkt. p. 10; 508 F. 2d 836 (2d Cir. 1974).

Napoleon Gabriel and Moumousis jointly petitioned the Supreme Court for a writ of certiorari to review the decision of the Second Circuit; that petition was denied on April 14, 1975. A petition for rehearing, filed on May 9, 1975, was denied on June 2, 1975. A second petition for rehearing was served upon appellees on June 26, 1975, and is believed to have been refused for filing by the Clerk of the Supreme Court.

On their appeals from the judgment awarding attorneys' fees, costs were assessed against petitioners Moumousis and Gabriel. Dkt. p. 10. They then moved to reduce these costs by motion dated April 1, 1975. This motion was denied by this Court on or about April 22, 1975. Petitioners next moved the Court to reconsider their motion to reduce costs on May 2, 1975. This too was denied on or about May 15, 1975. A motion for rehearing before a full panel, made on June 20, was denied on July 11, 1975.

On March 19, 1975, the motion to set aside the judgment which is the subject of the instant appeal was made. Judge Weinfeld denied this motion stating:

"I am going to deny the request made by the defendant [plaintiff-appellee Alleghany Corporation], which I regard as a proper one, that costs be imposed, because you are appearing for the first time pro se. But I am giving notice to you now, and notice to any other applicant, that a similar application will be denied because there is no substance to it, and will be denied with the imposition of substantial costs." (Transcript of Hearing of March 19, 1975, p. 11).

Undaunted, Gabriel filed the instant appeal. Dkt. p. 10. As noted above, Mr. Gabriel has since brought yet another unsuccessful motion to reopen the judgment, and costs were imposed. Dkt. p. 11.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE GABRIEL MOTION WITH RESPECT TO THE FINAL JUDGMENT

The motion before the District Court was, in effect, a motion for relief under Rule 60b of the Federal Rules of Civil Procedure. On appeal, the sole matter for review is the propriety of the grant or denial of that Rule 60b motion; the appeal does not bring up for review the final judgment itself. Hines v. Seaboard Air Line R. Co., 341 F.2d 229 (2d Cir. 1965). The test to be applied to determine the propriety of the lower court ruling is one of abuse of discretion. Parker v. Broadcast Music, Inc., 289 F.2d 313 (2d Cir. 1961). There has been no abuse of discretion in the instant case.

It is indeed difficult to perceive from the brief submitted by the appellant to this Court what arguments he is putting forth. By culling his brief however, one can isolate fourteen issues or grounds upon which he is apparently seeking to have the final judgment reopened. Each of these issues has been raised and rejected in the already overly protracted history of this litigation outlined above.

Set forth below is a list of each "issue" raised by Mr. Gabriel as we discern them:

- Alleghany's interest differed with that of the other members of the class.
- The settlement defrauded the government of taxes.
- A conspiracy existed between the appellees, the federal courts, and the ICC to defraud the U.S. government of its rightful taxes.
- The former Class B stock of MoPac was not evaluated under due process of law.
- The settlement was in contravention to the 1954 Agreed System Plan.
- The ICC evaded its duty under the MoPac charter.
- Jurisdiction of the District Court was based only on diversity of citizenship.
- The class was improper under the Supreme Court decision in Zahn v. International Paper, 414 U.S. 291 (1973).
- The settlement was unfair to the Class B stockholders.
- Appellee Robert LeVasseur had a conflict of interest as the owner of both Class A and Class B shares.
- The proxy statement seeking stockholder approval of the capitalization was inadequate with regard to income tax consequences.

- Attorneys' fees were improperly paid since the judgment was still subject to appeal.
- Attorneys' fees were paid in part for services rendered in a different case.
- The settlement was not within the framework of the pleadings.

None of these issues constitute "newly discovered evidence". Each of these issues has been proffered to the courts and to the ICC in substantially the same form and has been considered and rejected.

On the initial appeal from the judgment approving the settlement of this action and on the settlement hearing itself, each and every one of these issues was raised (other than those concerning attorney's fees) and resolved, supra. In addition, as discussed above, the Moumousis motion to set aside the judgment raised the issue of the propriety of Alleghany as one of the representatives of the class. The similar motion by Napoleon Gabriel was on the grounds that Zahn v. International Paper should be applied, depriving the court of jurisdiction, and that the settlement went beyond the framework of the pleadings. The fairness of the settlement was also raised before the ICC. The scope of the settlement was similarly challenged in Wesson's petition for certiorari, in his petition for a rehearing of the Supreme Court's denial of certiorari, before the

ICC, on petitions for reconsideration before the ICC, and before the District Court in Missouri. The jurisdiction of the District Court and the applicability of Zahn were raised on the Wesson petition for rehearing of the denial of certiorari and on the ICC rehearing petitions..

It is apparent that the appellant has introduced no "newly discovered evidence", nor has he raised a new argument in support of his motion. Not only could these arguments have been raised earlier, they indeed were. The prior decisions cited above are clearly res judicata in the instant case. A final judgment, affirmed on appeal, has conclusive effect and is res judicata on any grounds which were raised or might have been raised before the Appellate Court. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940); Miller v. National City Bank, 166 F.2d 723, 726 (2d Cir. 1948); 1B Moore's Federal Practice ¶ 0.405, at 624 and cases cited therein.

Petitioner was somewhat more focused in the motion papers he submitted to the court below on the motion from the denial of which he now appeals. There he argued that satisfactions of judgment filed as a result of payments made to the attorneys for plaintiffs pursuant to order of the District Court dated July 3, 1974, were premature in that this order was as yet subject to appeal.

There is no merit whatsoever to this argument.

It was raised in opposition to the fee applications of the plaintiffs, at the hearing on that application; [377 F. Supp. 926 (S.D.N.Y. 1974)] and again on the "appeal from" the fee order. [508 F.2d 836 (2d Cir. 1974)] The same argument was again asserted in the petition for certiorari. In short, appellant's contention that the allowance and payment of the fees was premature has been thoroughly litigated and rejected.

Appellant claims that the pendency of a motion under Rule 60b, the pendency of a petition for a rehearing of the denial of a writ of certiorari, and the pendency of an appeal from the decision of the ICC, all result in the prematurity of the fee payments. This contention is wholly unsupportable. A motion to vacate or modify the judgment had been denied. The pendency of a motion to vacate or modify a judgment does not affect the finality of that judgment nor does it suspend its operation. Rule 60(b), Federal Rules of Civil Procedure. It thus follows that an appeal from the denial of such a motion cannot affect finality.

Nor does the pendency of a challenge to the decision of the ICC affect the finality of that judgment. Actions challenging ICC determinations are not appeals, but are original actions brought to review the administrative proceeding and are confined exclusively to review of decisions on the record before the Commission. 28 U.S.C.

§ 2321-25; e.g., Assigned Car Cases, 274 U.S. 564 (1927);
Watson Bros. Transp. Co. v. U.S., 59 F. Supp. 762 (D.
Neb. 1945).

Nor did the pendency of the petition for rehearing from the denial of a writ of certiorari in any way affect the finality of the judgment. Rule 25(2), Supreme Court Rules; Stern & Gressman, Supreme Court Practice (4th Ed.), § 6.51, pp. 323-324.

Clearly, appellant has presented no basis on which the judgment should be "reopened". Indeed, each of the motions to vacate, modify, and/or reopen the judgment which has been filed in this case was clearly frivolous. No reason has been nor can be shown to reverse the judgment of the court below.

The record clearly demonstrates that a substantial and unnecessary burden has been placed upon the courts in this action by petitioner Gabriel, his brother Napoleon, and others. Mr. Gabriel's assertion that his latest contentions represent "newly discovered" evidence is flagrantly contradicted by the record and is clearly frivolous. Although Mr. Gabriel appears pro se, it is difficult to believe that he is not fully aware of that fact. He attended the original settlement hearings, actively participated in the ICC hearings, attended the oral argument of the appeals from the District Court's original order

as well as the hearing on the appeals of the orders denying the Moumouis and Napoleon Gabriel petitions; he must know, therefore, that the matters he seeks to raise have been thoroughly thrashed out in the District Court and before this Court. Given this background, it is hard to postulate a purpose Mr. Gabriel might have, beyond that of simple harassment.

The parties and their counsel are entitled to some protection from petitioner's harassing tactics. As a deterrent and as partial compensation, damages should be assessed against appellant and in favor of appellees. Federal Rules of Appellate Procedure, Rule 38.

CONCLUSION

For the foregoing reasons, the order of the District Court should be affirmed and double costs and damages in an amount deemed just and proper by this Court and not less than \$500, be assessed against appellant.

Respectfully submitted,

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July 29, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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-against-

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Defendants-Appellees,

JAMES C. GABRIEL,

Petitioner-Appellant.

Docket No.
75-7241

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. SCHLIP, being duly sworn, deposes and says that she is over the age of twenty-one years; that she is employed by the firm of Sullivan & Cromwell, attorneys for Defendants-Appellees Missouri Pacific Railroad Company, Robert H. Craft and T.C. Davis that on the 30th day of July, 1975 she served the within brief upon James C. Gabriel, Pro Se Appellant by depositing three true copies of the same securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said James C. Gabriel at P.O. Box 94, Sea Girt, New Jersey 08750.

Dorothy M. Schlip

Sworn to before me this
30th day of July, 1975

Leonard DiRusso
Notary Public

LEONARD DIRUSSO
NOTARY PUBLIC, State of New York
No. 24-1506914
Qualified in Kings County
Commission Expires March 30, 1978